

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

TROY E. MASON,)
) C.A. No. 06C-01-020 JTV
 Plaintiff,)
)
 v.)
)
 REDLINE TRANSPORT CORP.,)
 U.S. COLD STORAGE, AMERICAN)
 CONSUMER INDUSTRIES, INC.,)
 and RONNELL NICHOLS,)
)
 Defendants.)

Submitted: January 2, 2009

Decided: April 30, 2009

Michael I. Silverman, Esq., Silverman, McDonald & Friedman, Wilmington, Delaware. Attorney for Plaintiff.

Krista Reale Samis, Esq., Elzufon, Austin, Reardon, Tarlov & Mondell, Wilmington, Delaware. Attorney for Defendant U.S. Cold Storage.

Daniel L. McKenty, Esq., Heckler & Frabizzio, Wilmington, Delaware. Attorney for Defendants Redline and Nichols.

*Upon Consideration of Defendant U.S. Cold Storage's
Motion to Dismiss*

DENIED

VAUGHN, President Judge

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ORDER

Upon consideration of defendant U.S. Cold Storage's motion to dismiss the complaint, the opposition of the plaintiff and defendants Redline Transport Corp. and Ronnell Nichols, and the record of the case, it appears that:

1. I have decided to analyze U.S. Cold Storage's motion to dismiss the complaint under Rule 12(b)(6) for failure to state a claim upon which relief can be granted in the form in which it is presented, that is, as a motion to dismiss for failure to state a claim. The test of sufficiency for such a motion is a broad one, that is, whether the plaintiff may recover under any reasonably conceivable set of circumstances.¹

2. U.S. Cold Storage owns a warehouse facility with docks and doors at which trailers can be backed up to on-load or off-load products. The plaintiff, an employee of Redline Transport Corp., was injured while participating in the off-loading of product from a trailer owned by Redline at one of the docks. Specifically, he fell when the tractor trailer pulled forward as the first step in repositioning itself at the dock. He was pinned in some manner when the tractor trailer backed up.

3. An "owner or general contractor does not have a duty to protect an independent contractor's employees from the hazards of completing the contract."²

¹ *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

² *Handler Corp. v. Tlapecho*, 901 A.2d 737, 743 (Del. 2006); *Handler*, 901 A.2d at 743 (quoting *Kilgore v. Kroener*, 2002 WL 480944, at *6 (Del. Super. Ct. Mar. 14, 2002)). See also *Hawthorne v. Edis Co.*, 2003 WL 23009254, at *2 (Del. Super. Ct. July 14, 2003); *O'Connor v. Diamond State Tel. Co.*, 503 A.2d 661, 663 (Del. Super. Ct. 1985).

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The general rule is based on the theory that the “contractor possesses superior knowledge of the dangers inherent in the work to be performed.”³

4. Delaware law also recognizes exceptions to the general rule.⁴ An owner or general contractor has a duty to protect an independent contractor’s employees when the general contractor: (1) actively controls the manner and method of performing the contract work;⁵ (2) voluntarily undertakes the responsibility for implementing safety measures;⁶ or (3) retains possessory control over the work premises.⁷

5. U.S. Cold Storage contends that it is not liable because a premises owner is not liable to the employee of an independent contractor for injuries sustained as a result of performing the job he was hired to do.⁸ The case relied upon by U.S. Cold

³ *In Re: Asbestos Litigation, Limited To: Henry Wenke et al.* (“Wenke”), 2007 WL 1651964, at *5 (Del. Super. Ct. May 31, 2007) (citing *Vorous v. Cochran*, 249 A.2d 746, 747 (Del. Super. Ct. 1965)(tree surgeon hired to remove dead or decayed appendages not permitted to recover from landowners when he affixed his support rope to a dead limb and the rope snapped)).

⁴ *Handler*, 901 A.2d at 743.

⁵ *O’Connor*, 503 A.2d at 663 (citing *Williams v. Cantera*, 274 A.2d 698, 700 (Del. Super. Ct. 1971)); *Seeney v. Dover Country Club Apartments*, 318 A.2d at 619, 621 (Del. Super. Ct. 1974).

⁶ *Figgs v. Bellevue Holding Co.*, 652 A.2d 1084, 1092 (Del. Super. Ct. 1994) (quoting *Rabar v. E.I. duPont de Nemours & Co.*, 415 A.2d 499, 505 (Del. Super. Ct. 1980)).

⁷ *Bryant v. Delmarva Power & Light Co.*, 1995 WL 653987, at *8 (Del. Super. Ct. Oct. 2, 1995) (citing *Rabar*, 415 A.2d at 506).

⁸ *Wenke*, 2007 WL 165 1964 at *5, aff’d *Wenke v. E.I. duPont de Nemours and Co.*, 947 A.2d 1123 (Del. 2008).

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Storage is an asbestos case which pertained, in part, to workers exposed to asbestos because installing asbestos material was part of their job. The case draws a distinction between “Group B plaintiffs,” those who are “injured by the very hazards created by their own work on the property - the work they were contracted by the landowner to perform,”⁹ and “Group A plaintiffs,” those “injured as a result of the work (and negligence) of others including, arguably, the landowner.” For the latter group, the factors mentioned above under which a premises owner may be liable apply.¹⁰

6. I conclude that in this case the plaintiff is analogous to a “Group A plaintiff,” to use that phraseology, not a “Group B plaintiff.”

7. In paragraph 17 of the amended complaint, the plaintiff alleges that U.S. Cold Storage was negligent in various ways. After reviewing these allegations, I am satisfied that they are broad enough to be deemed allegations that U.S. Cold Storage (1) actively controlled the manner and method of performing the contract work; (2) voluntarily undertook the responsibility for implementing safety measures, or (3) retained possessory control over the work premises; and that in the course of so doing, it acted negligently. Although consideration of a motion to dismiss does not call for a review of underlying proof or evidence, the plaintiff’s arguments are strengthened by the deposition of Jeff Dixon, U.S. Cold Storage’s warehouse

⁹ *Wenke*, 2007 WL 1654964, at *10 (employees of independent contractors who were working directly with asbestos such as asbestos installers or asbestos insulators).

¹⁰ *Id.* (employees of independent contractors who did not work directly with asbestos such as painters who alleged exposure while working on the landowner’s premises).

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supervisor, which at a minimum implies that U.S. Cold Storage was actively involved in on-loading and off-loading operations, positioning of vehicles for on-loading and off-loading, and safety considerations relating thereto.

8. U.S. Cold Storage also contends that it cannot be liable because the dangers were open and obvious. This, however, is a question of fact which cannot be resolved in this motion.

9. I do not believe it necessary at this time to address allegations arising from Title 21 of the Delaware Code.

10. For the foregoing reasons, the motion to dismiss is ***denied***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotary
cc: Order Distribution
File